Supreme Court, U.S.
FILED

(1)

No. 971812 MAY 8 - 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

IN RE: DUBLIN SECURITIES, INC., ET AL.
Debtors,

MYRON N. TERLECKY, TRUSTEE,
Petitioner,

v.

DWIGHT I. HURD, ET AL.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

with Appendix

MYRON N. TERLECKY
*MARK W. IANNOTTA
STRIP, FARGO, SCHULMAN & HOPPERS CO.
575 South Third Street
Columbus, OH 43215
(614) 228-6345

Attorneys for Petitioner
**Counsel of Record*

May 4, 1998

LEGAL ADVANTAGE * 432 Walnut Street * Cincinnati, OH 45202
(800) 581-2252

100 pp

QUESTIONS PRESENTED

I. WHETHER THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY UPHELD THE DECISION OF THE DISTRICT COURT DISMISSING, FOR LACK OF STANDING, PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS BROUGHT BY A BANKRUPTCY TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE.

II. WHETHER THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS, ERRONEOUSLY APPLIED THE DOCTRINE OF *IN PARI DELICTO* TO BAR, AS A MATTER OF LAW, THE PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS BROUGHT BY A TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE.

III. WHETHER THE USE OF THE DOCTRINE OF *IN PARI DELICTO*, AS A MATTER OF LAW, TO BAR PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS BROUGHT BY A TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE IS IN CONTRAVENTION OF PUBLIC POLICY.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
STATUTE AND RULES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10

I. WHETHER THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY UPHELD THE DECISION OF THE DISTRICT COURT DISMISSING, FOR LACK OF STANDING, PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS BROUGHT BY A BANKRUPTCY TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE. 10

II. WHETHER THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS, ERRONEOUSLY APPLIED THE DOCTRINE OF *IN PARI DELICTO* TO BAR, AS A MATTER OF LAW, THE PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS BROUGHT BY A TRUSTEE ON BEHALF OF THE

BANKRUPTCY ESTATE. 14

III. WHETHER THE USE OF THE DOCTRINE OF *IN PARI DELICTO*, AS A MATTER OF LAW, TO BAR PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS BROUGHT BY A TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE IS IN CONTRAVENTION OF PUBLIC POLICY..... 18

CONCLUSION 22

APPENDIX ..... App. 1

6th Circuit Filings

Order Denying Petiton for Rehearing filed February 9, 1998 ..... A1-A2

Opinion filed December 23, 1997 ..... B1-B10

District Court Filings

Order Denying Motion to Alter or Amend filed August 13, 1996 ..... C1-C2

Opinion and Order filed May 28, 1996 ..... D1-D2

Second Amended Complaint filed January 9, 1996 ..... E1-E29

TABLE OF AUTHORITIES

CASES

Bateman Eichler, Hill Richards Inc. v. Berner, 471 U.S. 299 (1985) 15, 20, 21

Bubis v. Blanton, 885 F.2d 317 (6th Cir. 1989) 14

Bucyrus-Erie Co. v. General Products Corp., 643 F.2d 413 (6th Cir. 1981) 17

Burlington Industries, Inc. v. Milliken & Co., 690 F.2d 380, 388 (4th Cir. 1982), cert. denied, 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983) 19

Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972) 11

DSQ Properties Co., Ltd. v. DeLorean, 891 F.2d 128 (6th Cir. 1989) 12

F.D.I.C. v. Clark, 978 F. 2d. 1541 (10th Cir. 1993) 16

First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co., 612 F.2d 1164, 1174 (9th Cir.), cert. denied, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980) 19

Hirsch v. Arthur Andersen & Co., 72 F.3d 1085 (2nd Cir. 1995) 11

In re The Mediators, Inc., 105 F.3d 822 (2d Cir. 1997) .. 11

Kardo Co. v. Adams, 231 F. 950 (6th Cir. 1916) 17

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) 18

Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425, 431 (10th Cir. 1977) 19

O'Melvany & Myers v. Federal Deposit Insurance Corp., 512 U.S. 79 (1994) 14

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 18

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 18, 19

Pinto Truck Service, Inc. v. Motor Dispatch, Inc., 649 F.2d 530, 534 (7th Cir. 1981) 19

Regan v. Vinick & Young (In re Rare Coin Galleries of America, Inc.), 862 F.2d 896 (1st Cir. 1988) 13

Scholes v. Lehmann, 56 F.3d 750 (7th. Cir. 1995), cert. denied, 516 U.S. 1028 (1995) 12, 15, 16, 20

Shearson Lehman Hutton, Inc. v. Wagoner 944 F.2d 114, 120 (2d Cir. 1991) 11

Spartan Tube and Steel v. Himmelspach, 102 F. 3d 223 (6th. Cir. 1996) 12, 17

United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n. 9, (1983) 10

STATUTES

11 U.S.C. §323(b) 3

11 U.S.C. §541(a) 3

11 U.S.C. §704 3

28 U.S.C. §157(d) 7

28 U.S.C. §1254(1) 2

RULES

FED. R. APP. PRO. 35 2

FED. R. APP. PRO. 40 2

FED. R. BANKR. PRO. 6009 4

FED. R. CIV. PRO. 59 8

SUP. CT. R. 10(a) 2

OTHER AUTHORITIES

H.R. Rep. No. 595, 95th Cong.,
1st Sess. at 367-68 (1977);
S. Rep. No. 989, 95th Cong.,
2d Sess. 82-83 (1978);
U.S. Code Cong. & Admin. News 1978, p.5787 10

No. _____

In The
Supreme Court of the United States
October Term, 1997

----------+----------

MYRON N. TERLECKY, TRUSTEE, Appellant

vs.

DWIGHT I. HURD, et al., Appellee

----------+----------

Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

----------+----------

PETITION FOR WRIT OF CERTIORARI

----------+----------

Appellant, Myron N. Terlecky, Chapter 7 Trustee for the Consolidated Bankruptcy Estates of Dublin Securities, Inc., Dublin Management, Inc., and Dublin Stock Transfer, Inc., ("Trustee"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the

United States District Court for the Southern District of Ohio. Review is appropriate pursuant to Rule 10 of the Rules of this Court because the decision of the United States Court of Appeals for the Sixth Circuit conflicts with decisions of this Court and decisions of several other circuit courts of appeal. See Sup. Ct. R. 10(a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 133 F.3d 377, and is attached as part of the Appendix ("App."), App. B1-10. The opinion of the District Court is reported at 197 B.R. 66, and is attached as part of the Appendix, App., D1-21. The decision of the United States Court of Appeals for the Sixth Circuit denying the Appellant's petition for rehearing and rehearing en banc is attached as part of the Appendix, App. A1-2.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 23, 1997. Appellant's motion for rehearing and rehearing en banc pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure was denied on February 9, 1998. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Section 541(a) of the United States Bankruptcy Code, title 11 (the "Bankruptcy Code"), 11 U.S.C. §541(a), provides in pertinent part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Section 323(b) of the Bankruptcy Code, 11 U.S.C. §323(b), provides in pertinent part:

> (b) A trustee in a case under this title has the capacity to sue or be sued.

Section 704 of the Bankruptcy Code, 11 U.S.C. §704 provides in pertinent part:

> The trustee shall --
>
> (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is

> compatible with the best interests of parties in interests.

Rule 6009 of the Federal Rules of Bankruptcy Procedure provides:

> With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.

STATEMENT OF CASE

Bankruptcy and District Court Proceedings

On August 18, 1993, Dublin Securities, Inc. ("DSI"), Dublin Management, Inc. ("DMI") and Dublin Stock Transfer, Inc. ("DSTI") (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Southern District of Ohio, Eastern Division.

At the request of the United States Securities and Exchange Commission, the chapter 11 case of DSI was converted to a case under Chapter 7 on June 10, 1994. The Appellant was appointed the chapter 7 trustee for DSI on August 24, 1994. On the Appellant's motion, the chapter 11

cases of DMI and DSTI were converted to cases under Chapter 7, and substantively consolidated with the DSI case on January 6, 1995.

Complaints against the Appellees.

On August 17, 1995, the Appellant filed three separate adversary proceedings in the Bankruptcy Court against lawyers and law firms that formerly represented the Debtors, including Dwight Hurd, John Thomas, the law firm of Emens, Hurd, Kegler & Ritter, now known as Emens, Kegler, Brown, Hill & Ritter Co., L.P.A. ("Emens, Hurd"), Dennis Concilla, Andrew Federico and the law firm of Carlile, Patchen & Murphy. The Appellant also commenced an action in state court against unknown John Doe defendants on the same date. The Appellant amended his complaint on October 23,1995, and again on January 9, 1996. A copy of the Second Amended Complaint is attached as part of the Appendix, App. E1-29.

The Appellant's amended complaint asserts claims against the Appellees upon the following legal theories: negligence; breach of fiduciary duty; negligent misrepresentation; recklessness; negligent supervision by the law firms; common law fraud; and right of contribution. The amended complaint outlines a scheme to sell improperly registered securities to the public and to circumvent the statutory regulations imposing strict limitations on commissions earned from public offerings.

Under Ohio law, a Broker Dealer may sell the stock of a start-up company (Issuer) through an initial public offering and earn a commission limited to 3 percent or 15 percent depending on the nature of the transaction. Normally, three entities exist in a legal public offering: the issuing company; the broker dealer; and the public buyer. With the assistance of Dwight Hurd and the other Appellees, however, the Debtors' principal, Clarence Eyerman, introduced a fourth party in an attempt to structure the sales within an exemption under Ohio securities law.

Mr. Eyerman organized a group of straw men, intermediaries, who agreed to buy the stock from the issuing company and immediately sell the stock to DSI. The intermediaries consisted of members of the Eyerman family, friends of Mr. Eyerman and trusted employees (the "Insiders"). The sale by the straw men to DSI provided the context for Mr. Eyerman and the lawyers to claim that DSI "owned" the stock. Since DSI "owned" the stock, Mr. Eyerman and the attorneys claimed that all money earned from the sale of the stock was "profit", and not a commission subject to the statutory limitations. The scheme provided an enormous windfall. For example, if the issuing company's public offering sold for $4 a share to the public, under R.C. §1707.06(A)(1), DSI's commission would be limited to twelve cents ($.12). By using insiders, DSI's profit amounted to $2.75.

In an effort to avoid scrutiny of the scheme, legal

documents containing false and misleading facts were drafted by the Appellees and filed with the Ohio Division of Securities to verify the exemption. Certain events incident to the sale to the straw men and to DSI were staged and/or manipulated while the Appellees shielded the true facts from the Division and the public.

Within five years, almost all the issuing companies had filed for bankruptcy or gone out of business, the Debtors were bankrupt, and approximately 6,600 Ohioans were bilked for more than $60 million. During the same time, however, the Eyerman family looted approximately $17 million from the Debtors, and the lawyers who assisted DSI in this scheme received approximately $1.5 million in legal fees.

As a result of the fraudulent scheme and the misrepresentations made by the Appellees to the Ohio Division of Securities, a 327 count Indictment was issued against various parties, resulting in convictions of several officers of the Debtor and Dwight Hurd.

Motion to dismiss.

On January 16, 1996, the Appellees filed a motion to withdraw the reference with respect to the adversary proceeding and filed a motion to dismiss the Appellant's action. On February 23, 1996, the District Court granted the Appellee's motion to withdraw the reference from the Bankruptcy Court under 28 U.S.C. §157(d) and agreed to conduct all further proceedings in case.

On May 29, 1996, by its Opinion and Order, and the entry of a final judgment, the District Court dismissed the Appellant's lawsuit against the Defendants on the grounds that the Appellant lacked standing to assert the claims and on the doctrine of *in pari delicto*.

On June 12, 1996, the Appellant filed a motion, under Federal Rule 59, to alter or amend the judgment. On August 13, 1996, the District Court entered an order denying the Appellant's motion to alter of amend the judgment. Appellant subsequently filed a timely Notice of Appeal.

Motion for Injunctive Relief.

Following the dismissal of the Appellant's action against the Appellees in District Court, the Appellees filed a request for injunctive relief with the District Court seeking to enjoin the Appellant from naming any attorney from the Appellee law firms in the State Court Action. The District Court granted the Appellees' motion for temporary restraining order, ex parte.

By agreement of the parties, the preliminary and permanent injunction hearings were consolidated and held on August 12, 1996. The District Court granted a permanent injunction against Appellant on August 13, 1996.

On September 10, 1996, Appellant timely filed a Notice of Appeal of the District Court's granting of the permanent injunction.

Court of Appeals for the Sixth Circuit

On December 23, 1997, the Sixth Circuit affirmed the decision of the District Court based upon the application of the doctrine of *in pari delicto*, but failed to address the intricacies of the standing issue. (App. B5). The *in pari delicto* doctrine was applied because these particular defendants were named as parties to actions filed by creditors (App. B6). The court's use of the *in pari delicto* doctrine failed to consider the adverse actions of the officers and directors when it determined that:

> ". . . the officers and directors were the "alter egos" of the debtor corporations and any malfeasance on their part is directly attributable to the debtors themselves." (App. B7).

The court concluded as a matter of law:

> "the equitable principles of the doctrine of in pari delicto were properly interposed in this matter to prevent recovery by debtors who *conspired with the Defendants* to defraud innocent investors." (App.B10).

On February 9, 1998, the Appellant's petition for rehearing and suggestion for rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY UPHELD THE DECISION OF THE DISTRICT COURT DISMISSING, FOR LACK OF STANDING, PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS BROUGHT BY A BANKRUPTCY TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE.

Section 541(a)(1) of the Bankruptcy Code provides that "all legal or equitable interests of the debtor as of the commencement of the case" becomes property of the bankruptcy estate. This section has been determined to be very broad in scope and includes causes of action existing at the time of the case's commencement. H.R. Rep. No. 595, 95th Cong., 1st Sess. at 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978); U.S.Code Cong. & Admin. News 1978, p. 5787. See also United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n. 9, (1983).

The Sixth Circuit's decision failed to address the standing of a trustee to prosecute professional negligence and fraud claims belonging to the bankruptcy estate and is in conflict with other decisions of the Sixth and Seventh Circuits. Further, the decision below exemplifies the continued misapplication of this Court's pronouncements on

a bankruptcy trustee's standing in Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972).

In Caplin, this Court determined that a reorganization trustee under the Bankruptcy Act, the predecessor to the Bankruptcy Code, had no standing to assert, on behalf of debenture holders, claims of misconduct against a third party. Caplin was a five-to-four decision and the Court noted that the issue was "a difficult one" and has caused "even the most able jurists to disagree." Id. at 421-22. The Court's cause for concern was prophetic as a number of circuit courts have found that bankruptcy trustees lack standing to prosecute various types of claims which are property of the estate under 11 U.S.C. 541.

Second Circuit. In Hirsch v. Arthur Andersen & Co., 72 F.3d 1085 (2nd Cir. 1995), the Second Circuit correctly applied Connecticut law, which recognized liability for negligent acts of attorneys and accountants to third parties whose reliance was foreseeable and determined that a bankruptcy trustee lacked standing to assert professional negligence claims. The Second Circuit, in applying state law, has followed Caplin in determining that the trustee lacks standing to assert claims belonging to third parties. See, Shearson Lehman Hutton, Inc. v. Wagoner 944 F.2d 114, 120 (2d Cir. 1991) ("a claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors"); In re The Mediators, Inc., 105 F.3d 822 (2d Cir. 1997) (under New York law, a trustee had no standing to

bring a claim against parties who aided and abetted the debtor's breach of fiduciary duties).

Seventh Circuit. In Scholes v. Lehmann, 56 F.3d 750 (7th. Cir. 1995), cert. denied, 516 U.S. 1028 (1995) the Court analogized an equity receiver to a trustee in bankruptcy on the issue of standing and determined, "like a trustee in bankruptcy...may sue only to redress injuries to the entity in receivership, corresponding to the debtor in bankruptcy...." Id. at 753.

Sixth Circuit. The Sixth Circuit addressed the standing issue in DSQ Properties Co., Ltd. v. DeLorean, 891 F.2d 128 (6th Cir. 1989) and determined that a bankruptcy trustee was barred in settlement negotiations from representing a creditor of the bankruptcy estate. The Sixth Circuit in DSQ Properties correctly followed Caplin when it simply provided that the bankruptcy trustee has standing to prosecute only those causes of action belonging to the debtor entity.

The Sixth Circuit readdressed the standing issue in Spartan Tube and Steel v. Himmelspach, 102 F. 3d 223 (6th. Cir. 1996) and concluded that if state law authorized a debtor corporation to assert a claim, the claim is property of the estate.

In the decision below, the court found that the complaint alleged that the defendants prepared all legal documents for the securities sales offered by the debtor entities and provided day-to-day legal advice, but then

ignored Spartan Tube and Steel and relied on Caplin and DSQ Properties when it failed to reversse the district court's dismissal for lack of standing. It determined that the claims of the bankruptcy trustee against professionals involved in rendering services in conjunction with securities sales were claims belonging to third parties.

First Circuit. In the context of injunctive relief, the Court of Appeals determined that a bankruptcy trustee's negligence claims against an accounting firm was property of the estate and had standing to assert them. Regan v. Vinick & Young (In re Rare Coin Galleries of America, Inc.), 862 F.2d 896 (1st Cir. 1988).

The expansion by the Sixth Circuit of the decision in Caplin to deny standing to a bankruptcy trustee asserting claims of professional negligence and fraud weigh in favor of issuance of the writ.

II. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUIT COURTS OF APPEAL, ERRONEOUSLY APPLIED THE DOCTRINE OF *IN PARI DELICTO* TO BAR, AS A MATTER OF LAW, THE PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS OF THE TRUSTEE BROUGHT ON BEHALF OF THE BANKRUPTCY ESTATE.

The Court of Appeals for the Sixth Circuit upheld the decision of the district court to dismiss the professional negligence and fraud claims brought by the trustee by relying on the equitable defense of *in pari delicto*. The utilization of this equitable doctrine to bar the Trustee's claims as a matter of law, without reference to Ohio law, fails to follow the decision of this Court in O'Melvany & Myers v. Federal Deposit Insurance Corp., 512 U.S. 79 (1994), which provides that state law controls on the application of *in pari delicto*. Instead, the Sixth Circuit relied upon the case analysis in Bubis v. Blanton, 885 F.2d 317 (6th Cir. 1989), which involved a violation of Section 4(a) of the Clayton Act, 15 U.S.C.A. Section 15(a). This Court and a number of circuit courts have examined the application of the *in pari delicto* doctrine and reached a different conclusion than that reached by the Sixth Circuit.

In Bateman Eichler, Hill Richards Inc. v. Berner, 471 U.S. 299 (1985), this Court reviewed the history of the *in pari delicto* doctrine and its application to a securities fraud action. The Court noted that the defense of *in pari delicto* is premised on two grounds: (1) that courts should not mediate disputes among wrongdoers; and (2) the denial of judicial relief to admitted wrongdoers is an effective means of deterring illegality. Id. at 306. The Court went further in noting that the defense was narrowly limited to situations where the plaintiff truly bore at least equal responsibility for his injury, because "in cases where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*; for there may be and often are, very different degrees in their guilt." Id. at 307, citing 1 J. Story, Equity Jurisprudence 304-305 (13th ed. 1886). The Court further noted that traditionally the defense was limited and that the "public policy considerations that undergirde in the *in pari delicto* defense were frequently construed as precluding the defense even where the plaintiff bore substantial fault for his injury." Id. The Court in Bateman Eichler allowed investors to maintain a damages action notwithstanding that the investors were acting on inside information obtained in violation of securities laws. The decision was premised on the public policy considerations that outweighed the violations committed by the tippee.

The Seventh Circuit Court of Appeals in Scholes v. Lehmann, after analogizing a receiver to a bankruptcy

trustee, determined that the defense of *in pari delicto* was not applicable as it "loses its sting when the person who is *in pari delicto* is eliminated." Id. at 754 (citing McCandless v. Furlaud, 296 U.S. 140, 160 (1935).

The Sixth Circuit further premised its application of this equitable doctrine on the fact that creditors were also seeking compensation for the fraudulent activity in which the defendants engaged. However, the decision below is silent as to whether the doctrine would be applicable against professionals engaged in similar conduct where a class action is not pending. Further, the decision below is in conflict with the Scholes decision of the Seventh Circuit which was unpersuaded that a "class act could proved any less clumsy of a mechanism for recovery." Id. at 755.

Courts have considered whether the knowledge of an owner or officer is imputed to a corporate entity is an integral determination in the application of the *in pari delicto* doctrine.

Fifth Circuit. In F.D.I.C. v. Ernst & Young, 967 F. 2d 166 (5th Cir. 1992), the court determined, under Texas law, that the knowledge of the sole shareholder was imputed to the corporate entity.

Tenth Circuit. The decision in F.D.I.C. v. Clark, 978 F. 2d. 1541 (10th Cir. 1993) conflicts with the Fifth Circuit. The Tenth Circuit upheld the negligence action of the FDIC against two attorneys of a failed bank. The Tenth Circuit focused on the fact that the bank was the client, not the

officers, and that there could be not attribution of fault to the bank because the insiders were working to benefit themselves, not the bank.

The Sixth Circuit ignored Ohio law and the issue of imputation of the conduct of the officers. Its determination that the malfeasance on behalf of the officers and directors is attributable to the debtors -- the "alter egos" of the debtor corporations (App. B7) - conflicts with its own previous decisions on the alter ego doctrine.

The Sixth Circuit misapplied the alter ego doctrine in applying the defense of *in pari delicto* against the Trustee. The alter ego doctrine is an equitable rule which results in the corporate veil being pierced for the benefit of third parties, specifically, creditors of a corporation who would suffer an unjust loss or injury unless the shareholders are held liable for the corporate entities debts. Spartan Tube & Steel, 102 F.3d at 226; Kardo Co. v. Adams, 231 F. 950 (6th Cir. 1916), (criticized on other grounds by Weissman v. Weener, 12 F.3d 84 (7th Cir. 1993)); Bucyrus-Erie Co. v. General Products Corp., 643 F.2d 413 (6th Cir. 1981).

In Kardo, the Sixth Circuit held that the equitable rule that allows the corporate form to be disregarded cannot be invoked for the benefit of one who has done the corporation a wrong.

In this case, lawyers and law firms devised a fraudulent scheme, assisted the Debtors' officers in its implementation, and then hid the scheme from regulatory

authorities through the use of false representations. Strengthened by the *in pari delicto* doctrine, the circuit court's decision allows the equitable sword of the alter ego doctrine to be used as a shield by wrongdoers. There is no prior precedent for use of the alter ego doctrine in such a manner.

The conflicting decisions on the application of the *in pari delicto* doctrine as a bar to defeat actions brought on behalf of debtor entities by bankruptcy trustees and other independent fiduciaries, and the conflicting decisions regarding the imputation of the conduct of officers to a bankruptcy trustee, weigh in favor of the issuance of the writ.

III. THE USE OF THE DOCTRINE OF *IN PARI DELICTO*, AS A MATTER OF LAW, TO BAR PROFESSIONAL NEGLIGENCE AND FRAUD CLAIMS BROUGHT BY THE TRUSTEE IS IN CONTRAVENTION OF PUBLIC POLICY.

In the context of actions brought under other statutory schemes, federal courts have uniformly rejected the defense of unclean hands. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)(the Supreme Court rejected the unclean hands defense in an antitrust action) The rejection of the unclean hands defense was reaffirmed by applying the rationale offered by this Court for rejecting the *in pari delicto* defense. In Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), the Court

rejected the use of the *in pari delicto* defense when it determined that the purposes of antitrust laws are better served by insuring that the threat of a private action is encouraged to further the overriding public policy in favor of competition. Id. at 139. Various circuit courts of appeal have adopted this rationale. First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co., 612 F.2d 1164, 1174 (9th Cir.), cert. denied, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); see also Burlington Industries, Inc. v. Milliken & Co., 690 F.2d 380, 388 (4th Cir. 1982), cert. denied, 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983) ("It is well settled that unclean hands is no bar to antitrust recovery") (citing Perma Life, 392 U.S. at 138, 88 S.Ct. at 1985); Pinto Truck Service, Inc. v. Motor Dispatch, Inc., 649 F.2d 530, 534 (7th Cir. 1981) ("Proof of the plaintiff's unrelated unlawful conduct is not a valid ... defense to an antitrust charge") (citing Perma Life, 392 U.S. at 140, 88 S.Ct. at 1985); Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425, 431 (10th Cir. 1977) ("violation of a statute in the abstract is unavailable to an antitrust defendant to allow an antitrust case to be halted at the threshold") (citing Perma Life, 392 U.S. at 140, 88 S.Ct. at 1985).

The rationale applied by this Court and several circuits for rejecting the *in pari delicto* defense based upon public policy considerations in antitrust actions is equally compelling in this setting. The decision below conflicts with Bateman Eichler and the classical formulation of the defense

with its narrow limitations to those situations where the plaintiff truly bore substantially equal responsibility for its injury. The Sixth Circuit failed to consider that "it does not always follow that parties stand *in pari delicto* and that there may be and often are, very different degrees in their guilt." Bateman Eichler, 471 U.S. at 308.

The Seventh Circuit illustrated the fundamental reason for a rejection of *in pari delicto* defenses in Scholes v. Lehmann when it recognized that "the corporations, the Ponzi schemes principal's robotic tools, were in the eyes of the law separate legal entities with rights and duties." Id. at 754. The Seventh Circuit refused to apply the *in pari delicto* defense stating that "the defense loses its sting when the person who is *in pari delicto* is eliminated." Id. at 754 (citing McCandless v. Furlaud, 296 U.S. 140, 160 (1935)). The *in pari delicto* doctrine loses its sting upon appointment of a bankruptcy trustee empowered with Congressionally mandated duties. Just as this Court recognized the overriding public policy considerations of antitrust laws, and as followed by the Seventh Circuit in refusing to apply the *in pari delicto* defense in a Ponzi scheme case, public policy favors ethical conduct by attorneys and the Code of Professional Responsibility of each state demands it.

In Bateman Eichler, this Court refused to allow the equitable defense of *in pari delicto* to be applied against those parties who acted upon illegal insider trading information. The broad application of the *in pari delicto* defense by the

lower court not only undermines the integrity of the legal system by allowing professionals who, through their negligent or intentional acts, conspire with officers and directors to use corporate entities as vehicles of fraud and to escape civil liability through a bankruptcy filing, but is contrary to the narrow application directed by this Court.

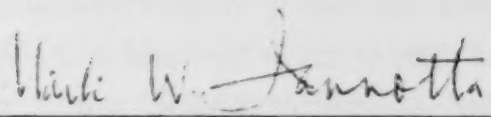
In Bateman Eichler, this Court embraced the public policy considerations and followed the classical formation of the equitable doctrine of *in pari delicto* and its narrow limitations. The Court, in the context of corporate insiders and broker dealers defrauding the investing public, determined that "there was no reason to give 'a license to defraud the investing public with little fear of prosecution.'" Id. at 319 citing (Berner v. Bateman Eichler, Hill Richards, Inc., 730 F. 3d 1319, 1323 (9th Cir. 1985)).

In this case, the Sixth Circuit has ignored the public policy considerations and the traditional application of *in pari delicto*, and has afforded unreasonable protection to professionals, who acted negligently and/or intentionally, from fear of civil liability unless creditors band together, presumably in the form of a class action, the clumsy mechanism rejected in Scholes. These factors mitigate in favor of the issuance of the writ.

CONCLUSION

In order to resolve the conflicts of opinion among courts on these issues, which are fundamental to the nature of the bankruptcy system and the statutorily-mandated role of the Trustee, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Myron N. Terlecky (Ohio Reg. # 0018628)
Mark W. Iannotta (Ohio Reg. # 0040357)
STRIP, FARGO, SCHULMAN
& HOPPERS CO., L.P.A.
575 South Third Street
Columbus, Ohio 43215-5759
Attorneys for Myron N. Terlecky, Trustee

Table of Appendix Contents

6TH CIRCUIT FILINGS:

Order Denying Petition for Rehearing,
filed 2/9/98 ..... A1-A2

Opinion,
filed 12/23/97 ..... B1-B10

SOUTHERN DISTRICT OF OHIO FILINGS:

Order Denying Motion to Alter or Amend,
filed 8/13/96 ..... C1-C2

Opinion and Order,
filed 5/28/96 ..... D1-D21

Second Amended Complaint,
filed 1/9/96 ..... E1-E29

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING
PETITION FOR REHEARING

Sixth Circuit Case Nº. 96-3725/3727
Filed February 9, 1998

Pages A-1 thru A-2

96-3725/ 3727

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: DUBLIN SECURITIES, INC., ET AL., Debtors, _____ MYRON N. TERLECKY, TRUSTEE, Plaintiff-Appellant, v. DWIGHT I. HURD, ET AL., Defendants-Appellees.	)	ORDER

BEFORE: RYAN, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a

vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 96-3725/3727
Filed December 23, 1997

Pages B-1 thru B-10

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

1997 FED App. 0368P (6th Cir.)
File Name: 97a0368p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Dublin Securities,
Inc., et al.,
Debtors.

Myron N. Terlecky, Trustee,
Plaintiff-Appellant,

v. Nos.96-3725
/3727

Dwight I. Hurd, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus
Nos. 96-00047; 96-00048
George C. Smith, District Judge

Argued: September 17, 1997

Decided and Filed: December 23, 1997
Before: RYAN, SUHRHEINRICH, and DAUGHTREY,
Circuit Judges.

COUNSEL

ARGUED: Myron N. Terlecky, STRIP, FARGO, SCHULMAN & HOPPERS CO.,L.P.A., Columbus, Ohio, for Appellant. John T. Sunderland,THOMPSON, HINE & FLORY, Columbus, Ohio, Marion H. Little, Jr., ZEIGER & CARPENTER, Columbus, Ohio, for Appellee. **ON BRIEF**: Myron N. Terlecky, Mark W. Iannotta, STRIP, FARGO, SCHULMAN & HOPPERS CO., L.P.A., Columbus, Ohio, Gerald J. Todaro, Columbus, Ohio, for Appellant. Marion H. Little, Jr., Stuart G. Parsell, ZEIGER & CARPENTER, Columbus, Ohio, John T. Sunderland, William C. Wilkinson, THOMPSON, HINE & FLORY, Columbus, Ohio, for Appellee. Lawrence A. Friedman, SECRETARY, NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEE, Southfield, Michigan, for Amicus Curiae.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Myron Terlecky, bankruptcy trustee of Dublin Securities, Inc., Dublin Management, Inc., and Dublin Stock Transfer, Inc., appeals to this court, alleging that the district court erred in dismissing his lawsuits against two law firms and individual members of those firms for lack of standing and based upon the doctrine of *in pari delicto*. He also challenges the district court decision enjoining him from

adding individual members of the defendant firms as named parties in a parallel state action. Because we agree with the district court's ultimate conclusion that the trustee may not maintain this action, and because injunctive relief is necessary in this matter, we affirm.

PROCEDURAL AND FACTUAL BACKGROUND

From 1985 until 1992, Dublin Securities, Inc., Dublin Management, Inc., and Dublin Stock Transfer, Inc. (hereafter referred to collectively as "Dublin Securities"), devised and carried out fraudulent initial public stock offerings. During that time, Dublin Securities was represented by the defendant law firms of Emens, Kegler, Brown, Hill & Ritter and Carlile, Patchen & Murphy, as well as by the defendant lawyers, Dennis J. Concilla, Andrew J. Federico, Dwight Hurd, and John R. Thomas. According to the complaints that initiated the present actions, the defendants prepared all legal documents for the securities sales, provided day-to-day legal advice for Dublin Securities, and even served as special counsel for the securities issuers, restructuring those companies, reviewing their business transactions, filing forms, and arranging for the issuance of stock certificates and warrants certificates.

By 1992, Dublin Securities had made approximately $60 million in fraudulent sales in Ohio. Late that year, however, authorities seized records of the companies and Dublin Securities was eventually forced to file for

bankruptcy pursuant to the provisions of Chapter 7 of the Bankruptcy Code. All principals of Dublin Securities were also convicted on various state criminal charges as a result of their activities.

Terlecky was appointed trustee in the Dublin Securities cases and eventually filed suit against the defendants, claiming that the firms and the individual lawyers knew or should have known of the illegal nature of the activities in which the companies engaged, but failed to apprise the businesses of those illegalities. The suits contained claims of negligence, breach of fiduciary duty, negligent misrepresentation, recklessness, common law fraud, and the right of contribution.

The defendants moved to dismiss the claims against them pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on the grounds that the trustee lacked standing, that the debtors were admitted joint tortfeasors, that the claims were barred under the doctrine of *in pari delicto*, and that the claims were untimely. The district court agreed, in part, and dismissed the complaint on standing grounds and pursuant to the doctrine of *in pari delicto*. When the trustee then attempted to amend a "John Doe" state lawsuit based on the same causes of action to include as parties law firm members who had not been named individually in the federal action, the district court also issued a permanent injunction forbidding such substitution. From those decisions, Terlecky now appeals.

DISCUSSION

Although both the Supreme Court and this court have specifically held that trustees in bankruptcy lack standing to pursue the claims of creditors against third parties, *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434 (1972); *DSQ Prop. Co., Ltd. v. DeLorean*, 891 F.2d 128, 131 (6th Cir. 1989), Terlecky argues those decisions are distinguishable from the situation presented here. Because we believe the equitable defense of *in pari delicto* can properly be applied in this case to dismiss the trustee's claims, however, we need not address the intricacies of the standing issue.

"*In pari delicto* refers to the plaintiff's participation in the same wrongdoing as the defendant." *Bubis v. Blanton*, 885 F.2d 317, 321 (6th Cir. 1989) (citing *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379, 1382 (9th Cir. 1977)). The doctrine is premised upon the equitable principle that "[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." *Jones v. Hyatt Legal Servs. (In re Dow)*, 132 B.R. 853, 860 (Bankr. S.D. Ohio 1991).

Terlecky contends, however, that *in pari delicto* principles apply only if the plaintiff is of equal or greater fault than a defendant. The trustee insists that in order to reach such a determination, a fact-finding inquiry is necessary and that because no such hearing occurred here, the doctrine may not be applied as intended. Nevertheless,

Terlecky admits in his complaint that the debtors' own actions were instrumental in perpetrating the fraud on the individuals choosing to invest in the Dublin Securities schemes. That pleading concedes, for example, that the debtors intentionally defrauded their investors. Such purposeful conduct thus establishes conclusively that the debtors were at least as culpable as the defendants in this matter.

The trustee also disputes application of the doctrine of *in pari delicto* on the bases (1) that it is against public policy to allow attorneys participating in such ethically reprehensible activity to escape civil sanctions and (2) that it is not the corporate debtors who are at fault here, but only the individuals who dominated the business entities. Neither of these two arguments is sufficient, however, to foreclose use of *in pari delicto* principles in a case such as this. First, by dismissing the trustee's suit against the attorneys and law firms, the district court did not insulate the defendants from all civil liability. In fact, as the court noticed judicially, the defendants here are also named as defendants in other actions filed by the creditors seeking compensation for the allegedly fraudulent activity in which the defendants engaged.

Also, while the trustee argues that the individual officers of the debtors acted adversely to the corporate interest and that their wrongdoing should not, therefore, be imputed to the corporate entity, he recognizes "that the

officers and directors so dominated and controlled the corporation that the corporation had no separate mind, will, or existence of its own." Consequently, the officers and directors were the "alter egos" of the debtor corporations and any malfeasance on their parts is directly attributable to the debtors themselves.

Prior to the district court decision in this matter, Terlecky also filed suit in Ohio state court against "John Doe" defendants "on claims arising out of the same transactions and occurrences set forth in the Complaints in the Federal Actions." In a final appellate issue, the trustee now complains that the district court erred in later enjoining him from "commencing or prosecuting any action in any court other than [the district court] against [the defendant law firms and lawyers] in any way relating to any of the facts, transactions or occurrences set forth in or underlying the Trustee's Complaints filed in the Federal Actions."

We review a grant of a permanent injunction only for an abuse of discretion. *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994), *cert. denied*, 514 U.S. 1127 (1995). An abuse of discretion is defined as a definite and firm conviction that the district court committed a clear error of judgment. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996). No such error occurred in this instance.

The district court originally issued its injunction pursuant to the All Writs Act, 28 U.S.C. § 1651, which

provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The trustee contends, however, that the injunction should not have issued because the defendants could not establish irreparable harm or a strong likelihood of success on the merits, because the district court order at issue was not final and non-appealable, and because any preclusion defense should be raised in the state court in the first instance.

Ordinarily, the Anti-Injunction Act, 28 U.S.C. § 2283, forbids a federal court from enjoining proceedings in state courts. That statutory provision nevertheless contains its own exception for situations "expressly authorized by Act of Congress, or where necessary in aid of [the district court's] jurisdiction, or to protect or effectuate its judgments." Id. (emphasis added). Here, the district court ruled that the bankruptcy trustee could not maintain an action against the defendant law firms and lawyers. Faced with an end to his federal litigation, the trustee sought to substitute for "John Doe defendants" in a parallel state court action the names of individual lawyers in the law firms that had been federal defendants. It was only at that point that the district court, in an effort to protect its judgment, issued the injunction now at issue on this appeal.

In such a situation, the potential irreparable harm to the defendants from the failure to issue an injunction is obvious. The purported state court defendants, agents of the law firm defendants in federal court, are forced to defend in yet another forum the identical claims that were asserted against their principals unsuccessfully. Furthermore, because of the collateral estoppel effect of that prior federal court decision, the likelihood of the defendants' success on the merits in the subsequent proceeding is conclusive.

Additionally, the district court decision that the trustee could not bring the malpractice claims against the defendants in this matter is a final determination that ends the litigation. The fact that the district court's decision has been appealed to this court is not, moreover, a reason not to issue the injunction requested by the defendants. As we previously noted, "a final judgment retains all of its preclusive effect pending appeal." *Erebia v. Chrysler Plastic Prods. Corp.*, 891 F.2d 1212, 1215 n.1 (6th Cir. 1989).

Finally, the trustee submits that the issuance of the injunction was premature. According to Terlecky's argument, the district court should not have issued the injunction prophylactically, but rather should have allowed the defendants to raise the defense in the state court action. Although preclusion defenses are often asserted in just such a manner, rational justification exists for permitting earlier

invocation of the defense. In *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 552 F.2d 601, 603 (5th Cir. 1977), the Fifth Circuit explained that "[t]here is no good reason to put a [prevailing party] to the harassment of an expensive, time-consuming procedure to prove its res judicata or estoppel claims in another court. . . . [N]either common sense nor precedent relegates the [prevailing party] to such [prevailing party] to such small comfort after . . . lengthy and expensive litigation." Similarly, in this case, the trustee can point to no justification for subjecting the potential state court defendants to continued vexatious litigation.

CONCLUSION AND RECOMMENDATION

We conclude that the equitable principles of the doctrine of *in pari delicto* were properly interposed in this matter to prevent recovery by debtors who conspired with the defendants to defraud innocent investors. For that reason, and because we also agree that the trustee should be enjoined from litigating these same claims against agents of the same defendants in another forum, we **AFFIRM** the judgment of the district court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING
MOTION TO ALTER OR AMEND

Sixth Circuit Case Nº. 96-3725/3727
Filed August 13, 1996

Pages C-1 thru C-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:

Dublin Securities, Inc., et al.,	Bankr. Nos.	93-55053 93-55054 93-55055
Debtors.	Judge Sellers	

Myron N. Terlecky, bankruptcy trustee,		
Plaintiff,		
-V-	Case Nos.	C-2-96-0047 C-2-96-0048
	JUDGE SMITH	
	Adv. Pro.	95-0259 95-0260
Dwight I. Hurd, et al., Defendants.	Judge Sellers	

ORDER

The Court entered final judgments in the above cases on May 29, 1996, holding that the trustee was barred from pursuing his purported claims against various attorneys and law firms who represented the debtor entities. The Court held that the trustee lacked standing and was barred under the doctrine of in pari delicto. The trustee moves under Fed.

R. Civ. P. 59 to alter or amend the Court's May 29, 1996 decision.

In essence, the trustee asks the Court to address defendants' other grounds for dismissal. The Court declines to do so. The issues of lack of standing and in pari delicto are dispositive of all of the trustee's claims.[1] The Court therefore DENIES the trustee's motion to alter or amend.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

---

[1]Although the Court did not devote an entire section of its opinion to in pari delicto, it found that the elements of the defense were satisfied in the instant case by uncontroverted evidence and the trustee's own admissions, whether the concept is applied to determine standing or as a separate defense. See Opinion and Order at 15-16, n.10 (citing and following Hirsch v. Arthur Anderson & Co., 72 F.3d 1085, 1094 (2d Cir. 1995)).

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OPINION AND ORDER

Sixth Circuit Case Nº. 96-3725/3727
Filed May 28, 1996

Pages D-1 thru D-21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:

Dublin Securities, Inc., et al.,	Bankr. Nos.	93-55053 93-55054 93-55055
Debtors.	Judge Sellers	

Myron N. Terlecky, bankruptcy trustee,		
Plaintiff,		
-v-	Case Nos.	C-2-96-0047 C-2-96-0048
	JUDGE SMITH	
	Adv. Pro.	95-0259 95-0260
Dwight I. Hurd, et al., Defendants.	Judge Sellers	

OPINION AND ORDER

Plaintiff bankruptcy trustee seeks damages from defendant attorneys for alleged malpractice. During the relevant times, before the bankruptcy court appointed plaintiff trustee, defendants represented the debtor entities

in connection with fraudulent intrastate penny stock sales for which debtors' principals were ultimately held criminally liable.

This Court withdrew reference of these actions from the bankruptcy court because the cases present non-core issues which would require trial before a jury. Defendants move to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), arguing, *inter alia*, that the trustee lacks standing to assert his claims, that the trustee's claims are barred because the debtor entities are admitted joint tortfeasors, that the trustee's claims are barred under the doctrine *in pari delicto*, and that the trustee's claims are untimely. For the following reasons the Court holds that the trustee lacks standing, and therefore the Court grants defendants' motions to dismiss.

I.

For purposes of adjudicating defendants' motions to dismiss, the Court assumes that the well-pleaded facts[1] set forth in plaintiff's second amended complaint are true. The Court also takes notice of certain undisputed facts set forth in the records of related court proceedings.

---

[1]The Court does not, however, accept as true any conclusory allegations, unwarranted inferences, or legal conclusions plaintiff pleads in his second amended complaint.

On August 25, 1994, the bankruptcy court appointed plaintiff Myron N. Terlecky to serve as trustee in bankruptcy trustee in the converted Chapter 7 proceeding In re: Dublin Securities. Inc., Bankr. No. 93-55053 (S.D. Ohio). On January 17, 1995, the bankruptcy court also appointed plaintiff to serve as trustee in bankruptcy in the related Chapter 7 proceedings In re: Dublin Management. Inc., Bankr. No. 93-55054 (S.D. Ohio), and In re: Dublin Stock Transfer Inc., Bankr. No. 93-55055 (S.D. Ohio) .[2]

Defendants are individual attorneys and law firms which represented Dublin Securities in connection with the sale of intrastate penny stocks. Defendants are: attorneys Dwight Hurd, John R. Thomas, Andrew J. Federico, and Dennis J. Concilla, and the law firms Emens, Kegler, Brown, Hill & Ritter ("Emens") and Carlile, Patchen & Murphy ("Carlile").

From 1987 and through 1992 Dublin Securities, acting as a broker dealer through its principles, devised and carried out a series of fraudulent offerings of so-called intrastate penny stocks.[3] The scheme was structured as

---

[2]For convenience the Court will refer to all three debtor entities collectively and interchangeably as "Dublin Securities."

[3]The Court is generally familiar with the scheme, having presided over SEC v. Midwest Investments, Inc., No. C-2-93-389 (S.D. Ohio May 18, 1993 and Feb. 2,

follows: Dublin Securities first identified a small company in need of capital (the "Issuer"). Dublin Securities told the Issuer that it would raise substantial money for the Issuer. The Issuer than sold stock and warrants to insiders consisting of Dublin Securities officers, employees and their friends and relatives.

The insiders agreed to resell their stock and warrants only to Dublin Securities for a price set by Dublin Securities. This agreement, referred to as the "Gentleman's Agreement," was actually a commission under Ohio securities law, and therefore the securities were not exempt from the registration requirements of Ohio securities law. Dublin Securities misrepresented the nature of the insider transactions to the investors and the Ohio Division of Securities.

Dublin Securities sold stock to the public, aggressively making cold calls from "boiler room" phone banks, and using scripted sales pitches containing exaggerated, incomplete, or misleading information. Dublin Securities set the price for the stock based entirely on its own desire for enormous profits. The undisclosed mark-up on the stock sold to the public was exorbitant, and the price

---

1995) (enjoining various activities in connection with the intrastate sale of Reitz Data Communications stock, finding the activities violated anti-fraud provisions of federal securities laws), aff'd, No. 94-3433, 85 F.3d 630 (6th Cir. May 6, 1996).

bore no relation whatsoever to the stock's actual value. In essence, stock with little or no value (worth, perhaps, a few cents per share) was sold by Dublin Securities to the public for $3 to $5 per share.

Dublin Securities made sales of about $60 million using these fraudulent tactics in thirteen different offerings. All of the transactions occurred in Ohio. On October 22, 1992, the Franklin County, Ohio special prosecutor seized all Dublin Securities documents and records. Dublin thereafter went into bankruptcy. Dublin Securities principals were ultimately convicted on various state criminal charges for their fraudulent activities.

The trustee maintains *inter alia* that the attorney defendants knew or should have known of the illegal nature of the activities of Dublin Securities, but failed to advise Dublin Securities of the illegality of the activities.

II.

Defendants move to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[4]

Rule 12(b)(1) provides for dismissal for lack of subject matter jurisdiction. In addressing a motion to dismiss under Rule 12(b)(1), the district court must accept as true all well-pleaded facts set forth in the complaint, and

---

[4]Dismissal for lack of standing is proper under Rule 12(b)(1) or 12(b)(6). Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 594, n. 2 (2d Cir. 1993).

must construe them in the light most favorable to the non-moving party. Hirsch v. Arthur Anderson & Co., 72 F.3d 1085, 1091 (2d Cir. 1995). A district court may also dismiss for lack of jurisdiction under Rule 12(b)(1) based on the complaint supplemented by undisputed facts appearing in the record, or based on the complaint supplemented by undisputed facts appearing in the record in conjunction with the district court's resolution of any disputed facts.[5] Ynclan v. Dept. of Air Force, 943 F.2d 1388, 1390 (5th Cir. 1991); see also Hirsch, 72 F.3d at 1091.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim "should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). All well-pleaded allegations must be taken as true and be construed most favorably toward the non-movant. Schuer v. Rhodes, 416 U.S. 232, 236 (1974); Mayer v. Mylod, 988 F.2d 635, 637 (6th Cir. 1993). While a court may not grant a Rule 12(b)(6) motion based on disbelief of a complaint's factual allegations, Lawler v. Marshall, 898 F.2d 1196, 1199 (6th Cir. 1990), the court "need not accept as true

---

[5]The Court finds it unnecessary to resolve factual disputes for purposes of addressing defendants' motion to dismiss.

legal conclusions or unwarranted factual inferences." Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987). Consequently, a complaint will not be dismissed pursuant to Rule 12(b)(6) unless there is no law to support the claims made, if the facts alleged are insufficient to state a claim, or if there is an insurmountable bar on the face of the complaint. A Rule 12(b)(6) motion to dismiss is directed solely to the complaint and any exhibits attached to it. Haffey v. Taft, 803 F. Supp. 121, 127 (S.D. Ohio 1992).

III.

Defendants argue that these actions must be dismissed because the trustee lacks standing. Standing is a prudential and judicially self-imposed limit on the exercise of federal jurisdiction. United Food and Commercial Workers Union Local 751 v. Brown Group. Inc., 64 U.S.L.W. 4430, 4332 (U.S. May 13, 1996). The standing doctrine coincides with the case or controversy limitation on federal jurisdiction expressed in U.S. Const. art. III, § 2, cl. 1. Allen v. Wright, 468 U.S. 737, 751 (1984). Thus, the standing "'inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

Standing is "'perhaps the most important of the [jurisdictional] doctrines.'" Id. (quoting Allen, 468 U.S. at 750). Yet, the doctrine of standing "has been called one of

the most amorphous [concepts] in the entire domain of public law." Flast v. Cohen, 392 U.S. 83, 99 (1968).

At its core, the doctrine of standing requires the plaintiff to allege "a distinct and palpable injury to himself." Warth, 422 U.S. at 501. The injury must be particularized to the plaintiff and concrete, not abstract, conjectural, or hypothetical. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

Standing may not be inferred from the pleadings or arguments set forth in the pleadings; rather, it must affirmatively appear in the record. FW/PBS. Inc. v. City of Dallas, 493 U.S. 215, 231 (1990). The party asserting jurisdiction bears the burden "'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" Id. (quoting Warth, 422 U.S. at 518).

A trustee in bankruptcy lacks standing to pursue the general claims of creditors against third parties. Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 434 (1972); Gaff v. Federal Deposit Ins. Corp., 919 F.2d 384, 394 (6th Cir. 1990); DSQ Property Co.. LTD. v. DeLorean, 891 F.2d 128, 130 (6th Cir. 1989). The Court in Caplin held that a bankruptcy trustee lacked standing to assert claims against debenture trustees on behalf of creditor debenture holders. 406 U.S. at 434. The Caplin Court based its decision on three concerns: First, the Court noted that Congress had evinced no intent to give bankruptcy trustees

the authority to pursue claims of debenture holders. Id. at 428-29. Second, the Court observed that the debtor corporation did not have any direct claim against the debenture trustees. Id. at 429-30. Third, the court found that the trustee's action could interfere with the independent efforts of debenture holders to pursue claims against debenture trustees, especially if the bankruptcy trustee and debenture holders could not agree on theories of relief or the amounts of damages. Id. at 431-32. Moreover, it is questionable whether the trustee could broker a binding settlement on behalf of such creditors. Id. at 432. The class action mechanisms set forth in Fed. R. Civ. P. 23, in contrast, would avoid some of these problems. Id. at 433.

Congress has the power to grant standing to the bankruptcy trustee to assert creditors' claims, but has expressly declined to do so. DSQ Properties, 891 F.2d at 131 (noting Congress expressly rejected proposed amendment to the Bankruptcy Code that would have reversed Caplin); see Caplin, 406 U.S. at 434 (opining that Congress could confer standing to trustee to pursue claims on behalf debenture holders); cf. Local 751, 64 U.S.L.W. at 4332-34 (holding that the Worker Adjustment and Restraining Notification Act granted unions standing to sue certain employers for backpay on behalf of its individual members).

The trustee contends that the Caplin rule does not apply to his claims because he asserts debtors' claims of

attorney malpractice, not claims of individual defrauded investor-creditors against debtors' attorneys. See Trustee's memorandum in opposition at 16. Defendants maintain that the trustee's characterization of his claims as ones for attorney malpractice does not confer standing.

Defendants rely on the Second Circuit Court of Appeals' recent decision in Hirsch v. Arthur Anderson & Co., 72 F.3d 1085 (1995) for the proposition that a debtor's professional malpractice claim does not result in the trustee having standing to pursue what are, in essence, claims of creditors. The facts of Hirsch closely resemble those of the instant case. In Hirsch, the debtor partnership perpetrated an illegal real estate investment scheme. The general partners were convicted for wire fraud, bank fraud, attempt to impede administration of internal revenue laws, and structuring transactions to avoid reporting requirements. The transactions were part of a Ponzi scheme involving the continuous creation and sale of limited partnership interests. See Hirsch, 72 F.3d at 1088 n.3.

The bankruptcy trustee for the consolidated estates of the partnership and general partners in Hirsch sued the accounting firm and law firms that had represented the partnership in connection with the fraudulent transactions, asserting, *inter alia*, fraud, breach of fiduciary duty, and professional malpractice on the part of the defendant professionals.

The defendants in Hirsch moved under Fed. R. Civ. P. 12(b)(1) to dismiss the trustee's action for lack of standing. The district court granted the motion, stating

> Recognizing that he cannot assert claims against defendants on behalf of the creditors, the trustee alleges damage to the debtors, to the extent of the unpaid allegations of the debtors to the creditors. Yet, the trustee has not alleged any distinct way in which the debtors were injured by the asserted wrongdoing of the defendants. Rather, the trustee alleges that the debtors suffered injuries identical to those of the creditors. Under these circumstances, it is the individual creditors, rather than the trustee, who may seek recovery from the defendants. Accordingly, the trustee lacks standing to assert these claims.

Hirsch v. Arthur Anderson & Co., 178 B.R. 40, 43 (D.Conn 1994) .[6] The court of appeals affirmed the district court's judgment. 72 F.3d at 1096. The circuit court agreed with the district judge that the trustee lacked standing to assert the claims of the defrauded investors in the limited partnerships. Id. at 1093. The court reasoned that under Connecticut law, limited partners could maintain a direct

---

[6]In a later unpublished opinion, the district court reconsidered its ruling in connection with a particular malpractice claim, but nonetheless adhered to its original decision. See 72 F.3d at 1091.

action against the general partnership's attorneys or accountants notwithstanding lack of privity. Id. The court concluded that such claims belonged exclusively to the defrauded investors because the investors had suffered injury particularized to them. Id.

Most significantly, the court of appeals in Hirsch also upheld the district court's dismissal of the trustee's professional malpractice claims -- claims which were, in theory, property of the consolidated estate. The district court had concluded that any injury to the debtors was ultimately passed on to the defrauded creditors. The court of appeals, while agreeing with this rationale, found that the trustee's complaint failed sufficiently to allege domination and control of the debtors by the defendants, and concluded that dismissal of the professional malpractice claims was proper under the rule that "a trustee lacks standing to sue third parties who have joined [the debtors] in defrauding creditors." Id. at 1094 (relying on Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118 (2d Cir. 1991)).

The trustee attempts to distinguish Hirsch on the ground that it rested on Connecticut law, which, unlike Ohio law, allows third party actions against attorneys in the absence of privity.

With respect to accountant liability to third parties, Ohio has adopted a rule similar to the one followed in Connecticut:

> An accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant's representation is specifically foreseen.

Haddon View Inv. Co. v. Coopers & Lybrand, 70 Ohio St. 2d 154 (1982) (syllabus by the court); see id. at 155-56 (discussing Ultramares Corp. v. Touche. Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931) (Cardozo, J.) and Restatement (Second) of Torts § 552 (1976)).

Nonetheless, in Ohio, as in most jurisdictions, an attorney is generally immune from third party suits for malpractice:

> An attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with knowledge of his client, unless such third person is in privily with the client or the attorney acts maliciously.

Scholler v. Scholler, 10 Ohio St. 3d 98 (1984) (syllabus by the court, para. 1). Since Haddon, several classes of plaintiffs have argued that the more liberal Haddon standard should be applied to attorney liability, but Ohio appellate courts have consistently rejected the argument, holding that attorney liability is governed exclusively by the standard set forth in Scholler. See Columbus Consol. Agency. Inc. v. Wolfson, 70 Ohio App. 3d 467, 471 (10th Dist. 1990) (holding that attorney who rendered erroneous opinion that program did not constitute

sale of securities under Ohio or federal law was immune from suit by purchasers of securities sales program, refusing to apply Haddon); see also Simon v. Zipperstein, 32 Ohio St. 3d 74 (1987) (restating rule of Scholler, reversing court of appeal's decision that adopted Ultramares standard for attorney liability); American Express Travel Rel. Ser. Co. v. Mandilakas, No. 68783, 1996 WL 239862, at *3-4 (Ohio App. 8th Dist. May 9, 1996); Arpadi v. First MSP Corp., No. 59939, 1992 WL 83836, at *3-5 (Ohio App. 8th Dist. Apr. 23, 1992) (holding that attorney who represented limited partnership immune from suit by limited partners, refusing to apply Haddon); but see Simon at 77-78 (dissenting opinion by Brown, J., arguing privity requirement should be abandoned); cf. Central Bank of Denver. N.A. v. First Interstate Bank of Denver. N.A., 114 S. Ct. 1439 (1994) (rejecting action for "aiding and abetting" securities fraud).

The trustee is correct in asserting that the defrauded creditors cannot pin their hopes of recovery on a direct common law malpractice action against the defendant attorneys. Nevertheless, this does not render Hirsch inapplicable. In Hirsch, the thrust of the court's reference to the availability of a negligent misrepresentation claim by the defrauded creditors was simply to show that the defrauded creditors had some avenue for relief against the professional defendants. In the instant case, it is abundantly clear that the defrauded investors have several viable

avenues for relief against the defendant attorneys. Indeed, the defrauded investors have already begun to avail themselves of these remedies. For example, the Court takes notice that defendants Hurd and Emens are named as defendants in a class action by investors who purchased shares of Environmental Safety First, Inc. through Dublin Securities. Glatz v. Beaman, Case No. 92-CV-058 (Erie Cty. Ohio Com. Pl). The Glatz plaintiffs assert what can fairly be characterized as direct allegations of securities fraud against defendant Hurd. See Glatz compl. paras. 39-46, 65. In addition, plaintiffs in a class action pending in the Western Division of this District assert RICO claims against defendants Hurd, Emens, and Carlile. Bryk v. Hurd, Case No. C-1-951096 (S.D. Ohio). The Bryk plaintiffs assert, for example, that defendant Hurd "was involved in the management and control of the Dublin Companies from the inception of the conspiracy until late 1992." Bryk compl. para. 2. Similarly, the complaint in Bryk alleges that the Emens and Carlile firms were "directly involved" in operating Dublin Securities. Id. Para. 8, 9. In short, the Bryk plaintiffs allege that the defendant attorneys were directly involved in the alleged scheme.

Although under Scholler attorneys are generally immune from malpractice suits brought by third parties, it does not follow that the immunity shields attorneys from direct actions for fraud. For example, it is well established

that an attorney may be liable for direct participation in securities fraud:

> Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met.

Central Bank of Denver, 114 S.Ct. at 1455; Anixter v. Home-Stake Prod., 77 F.3d 1215 (l0th Cir. 1996) (holding that accountant could be held primarily liable for securities fraud, but reversing verdict against accountant because of erroneous jury instruction on aiding and abetting); Molecular Technology Corp. v. Valentine, 925 F.2d 910, 917-18 (6th Cir. 1991) (discussing potential primary liability of attorney for securities fraud). Admittedly, the plaintiffs in Glatz or Bryk have not, to this Court's knowledge, attempted to assert federal securities law claims against the attorney defendants. Perhaps they have refrained from doing so believing that the purely intrastate penny stock transactions were exempt from the reach of the anti-fraud provisions of federal securities laws.[7] Such

---

[7]Understandably, defendants do not volunteer to discuss new theories under which they could be held liable.

claims may be available to the defrauded investors in light of this Court's ruling in SEC v. Midwest Investments Inc., No. C-2-93-389 (S.D. Ohio May 18, 1993 and Feb. 2, 1995) (enjoining various activities in connection with the sale of Reitz Data Communications stock, finding the activities violated anti-fraud provisions of federal securities laws), aff'd, No. 94-3433 (6th Cir. May 6, 1996).[8]

In sum, the defrauded investors in the instant case have direct avenues of relief against the defendant attorneys.[9] Hence, the rationale of Hirsch applies to the instant case. The Court finds that Hirsch is well-reasoned and on point.

The Court will not rely solely on Hirsch, however. The Court finds that application of the factors discussed in Caplin dictates the same result.

The first concern of the Court in Caplin had was that Congress had not authorized bankruptcy trustees to bring actions on behalf of debenture holders. 406 U.S. at 428-29. Here, Congress has likewise evinced no intent to

---

[8]The trustee appears to recognize the possibility of federal claims arising from the subject transactions. See Second Amended Compl. para. 20 and 38.

[9]There may, of course, be bars to such claims, such as statute of limitations. The trustee, however, would face the same hurdles in attempting to assert claims against the attorney defendants.

grant trustees standing to bring claims on behalf of defrauded investors. See DSQ Properties, 891 F.2d at 131 (noting Congress expressly rejected proposed amendment to the Bankruptcy Code that would have reversed Caplin).

Second, the Court in Caplin observed that the debtor corporation did not have any direct claim against the debenture trustees. Id. at 429-30. The trustee in the instant case seeks to satisfy this concern by couching his claims under the rubric professional malpractice. The standing inquiry, however, focuses on the injury to the plaintiff rather than the particular legal theory at issue. That the estate could, in theory, have a malpractice claim is not dispositive.[10] The real injured parties are the investors, not the debtor corporations. Whatever claims the debtor entities

---

[10]The Court finds merit in the Hirsch court's conclusion that the debtor entities were not, as the trustee suggests, pure as the driven snow, existing wholly separate and apart from the principals who created the entities for what has been determined to have been criminal purposes. See 72 F.3d at 1094 ("A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not the guilty corporation") (quoting Wagoner, 944 F.2d at 120). Although akin to concepts like in pari delicto, this doctrine exists as an independent concept applied in analyzing whether a bankruptcy trustee lacks standing. See Wagoner at 120.

may have for malpractice are strictly *vis-a-vis* the injury suffered by the defrauded investors.

The third concern of the Caplin Court is particularly significant as applied to the instant case. The Court in Caplin opined that the trustee's claims might interfere with the independent efforts of debenture holders pursuing directly their own claims against the debenture trustees, especially if the bankruptcy trustee and debenture holders could not agree on theories of relief or the amounts of damages. Id. at 431-32. Moreover, it is questionable whether the trustee could broker a binding settlement on behalf of such creditors. Id. at 432. Class actions under Fed. R. Civ. P. 23 avoid some of these problems. Id. at 433.

Here, class actions are pending in other forums in which defrauded investors seek relief directly against defendant attorneys. The Court is persuaded that the concerns of the Caplin Court would be realized in the instant case if the trustee was held to have standing to assert causes of action which belong more properly to the defrauded investors. The real injured parties should be given the opportunity to guide the litigation and choose their own strategies and legal theories in seeking whatever relief to which they may be entitled against the defendant attorneys. Moreover, as in Caplin, the trustee in bankruptcy would not likely be able to negotiate a binding settlement on behalf of the investors.

In addition, as defendants aptly point out, there is little if anything to be gained, and potentially much to be lost, by filtering the investors' claims through the bankruptcy estate. It would be grossly inefficient to enlarge the carcass of the debtor entities merely to effect a costly pass-through of the investors' claims against the attorney defendants. Such an exercise would serve only to line the pockets of non-creditors, who stand in a position to receive payment from any recovery off-the top in the form of administrative expenses under 11 U.S.C. § 726(a)(1). As the Court in Caplin observed, class actions under Fed. R. Civ. P. 23 avoid such problems.

For these reasons, the Court concludes that the trustee does not have standing to assert claims against defendants. The threshold issue of standing is dispositive; the Court therefore does not reach defendants' other grounds for dismissal.

IV.

Based on the above, the Court **HOLDS** that the plaintiff bankruptcy trustee lacks standing to assert the claims presented in these actions. The Court therefore **GRANTS** defendants' motions to dismiss.

The Clerk shall enter a final judgment in these actions in favor of defendants, and against plaintiff, dismissing these actions for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

The Clerk shall remove these cases from the Court's pending cases and motions lists.

The Clerk shall unseal all documents previously filed under seal in this case. See Nixon v. Warner Communications. Inc., 435 U.S. 589, 597 (1978); In re Knoxville News-Sentinel Co., 723 F.2d 470, 473-74 (6th Cir. 1983).

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SECOND AMENDED COMPLAINT

Sixth Circuit Case Nº. 96-3725/3727
Filed January 9, 1996

Pages E-1 thru E-29

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re	:	
	:	
DUBLIN SECURITIES,INC.	:	Case No. 93-55053
DUBLIN MANAGEMENT, INC.	:	Case No. 93-55054
DUBLIN STOCK TRANSFER,INC.	:	Case No. 93-55055
	:	
Debtors,	:	Chapter 11
	:	(Judge Sellers)
	:	
MYRON N. TERLECKY, Trustee	:	
for the Bankruptcy Estates	:	
Dublin Securities, Inc.,	:	
Dublin Management, Inc. and	:	
Dublin Stock Transfer, Inc.,	:	
(the "Dublin Companies")	:	
575 South Third Street	:	
Columbus, Ohio 43215,	:	
	:	
Plaintiff,	:	
	:	Adv. No. 95-0259
	:	
	:	JURY DEMAND
-vs-	:	ENDORSED
	:	HEREON
DWIGHT HURD	:	
366 East Broad Street	:	FILED UNDER
Columbus, Ohio 43215	:	SEAL
	:	
JOHN R. THOMAS	:	
65 East State Street	:	

Columbus, Ohio 43215-0429 :
EMENS, KEGLER, BROWN, :
HILL & RITTER CO., L.P.A., :
formerly known as Emens, Hurd, :
Kegler & Ritter Co., L.P.A. :
65 East State Street, Ste. 1100 :
Columbus, Ohio 43215-0429 :
:
Defendants. :

SECOND AMENDED COMPLAINT

JURISDICTION

1. Plaintiff is the duly appointed, qualified and acting Bankruptcy Trustee in the consolidated bankruptcy estates captioned In re: Dublin Securities. Inc.. Case No. 93-55053; In re: Dublin Management. Inc., Case No. 93-55054; and In re: Dublin Stock Transfer. Inc., Case No. 9355055 and which are currently pending pursuant to Chapter 7 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division.

2. Jurisdiction over this Adversary Proceeding is vested in the United States Bankruptcy Court pursuant to the provisions of 28 U.S.C. 1334(b) and the general order of reference of the United States District Court for the Southern District of Ohio entered pursuant to 28 U.S.C. 157, and 11 U.S.C. 544 and Rule 7001 of the Rules of Bankruptcy Procedure. Jurisdiction over this Adversary

Proceeding is further vested in this Court pursuant to the provisions of 28 U.S.C. 1331 and 1367.

This is a non-core related proceeding pursuant to 28 U.S.C.157(c) of the United States Code.

3. The venue of this Adversary Proceeding is with this Court pursuant to 28 U.S.C. 1409(a) and (c).

ALLEGATIONS OF FACT

4. On August 18, 1993, Dublin Securities, Inc., (hereinafter referred to as "DSI") filed a voluntary petition pursuant to Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Ohio, Case No. 9355053.

5. On August 18, 1993, Dublin Management, Inc., (hereinafter referred to as "DMI") filed a voluntary petition pursuant to Chapter I I of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Ohio, Case No. 9355054.

6. On August 18, 1993, Dublin Stock Transfer, Inc., (hereinafter referred to as "DSTI") filed a voluntary petition pursuant to Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Ohio, Case No. 93-55055.

7. DSI was converted to a proceeding under Chapter 7 of the Bankruptcy Code on June 10, 1994. Plaintiff was appointed the Successor Trustee in the DSI proceeding on August 25, 1994.

8. Pursuant to Orders entered by the Bankruptcy Court on January 9, 1995, the DMI and DSTI proceedings were converted to proceedings under Chapter 7 of the Bankruptcy Code and were substantively consolidated with the DSI Chapter 7 bankruptcy proceeding.

9. Plaintiff was appointed the Chapter 7 Trustee in the DSTI and DMI proceedings on January 17, 1995.

10. Plaintiff is authorized to pursue all claims of DSI, DMI and DSTI (hereinafter referred to as "Dublin") pursuant to Section 704 of the Bankruptcy Code.

11. The Defendant, Emens, Kegler, Brown, Hill & Ritter, L.P.A. is the successor in interest to Emens, Hurd, Kegler & Ritter Co., L.P.A. ("Emens Hurd"). At all times relevant to the within proceeding, Emens Hurd was a legal professional association organized under the laws of the State of Ohio, with its principal place of business at 65 E. State St., Suite 1800, Columbus, Ohio.

12. At all times relevant herein, the Defendant, John R Thomas, was an attorney duly admitted to the practice of law in the State of Ohio and was a partner-employee and/or agent of Emens Hurd.

13. At all times herein, Defendant, Dwight Hurd was a partner-agent-employee of the firm of Emens Hurd through April 20, 1992.

14. The Defendants at all times relevant herein were acting within the scope of their agency and/or employment by Emens Hurd.

15. The Defendants represented to the public an expertise in the practice of corporate and securities law.

16. Dublin were all Ohio corporations, and affiliates of each other and engaged in conduct connected to the intrastate sale of securities.

17. From approximately January 1,1987, through the middle of March 1992, the Defendant Emens and Thomas represented Dublin as general corporate and securities counsel.

18. Dublin acted as broker and market maker in a series of initial public stock offerings, including transactions involving Agents Financial Group, Inc., Feast Products, Inc., Sandcastle Boats, Inc., McCoy Avionics, Inc., Environmental Safety First Industries, Inc., National Sorbents, Inc., Smart Tag Systems, Inc., Dewey's Candy Company, Aerospace Lubricants, Inc., Telelogic Communications, Inc., (collectively hereinafter referred to as the "Issuers"). Dublin also acted as broker and market maker in a series of initial public stock offerings, for Confluence, Lifeline and Reitz).

19. The essential steps involving the initial public stock offerings of the companies described in the proceeding paragraph are as follows:

A. Officers of Dublin sought small company(s) (the "Issuer(s)") in need of capital and represented to the Issuer that it could raise a substantial amount of money for the Issuer, if it complied with the following:

ii. Accept in agents, Issuer elected or appointed an officer of Dublin to serve as an officer or director of Issuer;

iii. Issuer used Dublin's attorneys, (the Defendants herein) for the proposed offering;

iv. Issuer created units for sale consisting of one share and three to seven warrants;

v. Issuer offered its units to "investors" from a list of names predetermined, supplied, and approved by Dublin;

vi. Those "investors" were typically officers, employees, salespersons of Dublin or relatives and friends of such persons (hereinafter defined as "Insider Investors") or individuals pre-approved by Dublin;

vii. Issuer sold units to Insider Investors whose names repeatedly appeared on the approved list of potential purchasers;

B. Dublin arranged and the Insider-Investors agreed to sell their shares or detachable warrants only to Dublin at the price set by Dublin. Dublin's arrangement with the Inside Investors was referred to as the "Gentleman's Agreement."

C. The sales calls to the Insider Investors were conducted by Dublin employees or supervised and controlled by employees of Dublin and in later "deals" performed by the Issuer pursuant to instruction by employees of Dublin sitting on the Issuer's Board of Directors.

D. In theory, Dublin would exercise warrants for the Issuer's stock before Dublin sold stock to public shareholders.

E. After the stock was issued to the Insider Investors Dublin would purchase shares and warrants from the Insider Investor.

F. On many occasions, Dublin sold stock to the public without exercising the warrants purchased from the Insider Investors.

G. The sale of the Issuer's stock to the public ranged in price from Three Dollars ($3) to Five Dollars ($5), an excessive mark-up and unrelated to the stock's actual value;

H. Most of the Issuers failed to receive any money from the sales to public shareholders.

I. As Dublin continued to sell the Issuers' stock between 1987 and 1992, public shareholders increasingly failed to receive evidence of stock ownership.

J. The sales to the public were accomplished by Dublin's utilization of scripted "boiler room" sales tactics. Many of the sales presentations included exaggerated or misleading information.

K. As sales to the public progressed, the Issuers demanded the exercise of warrants and the exercise price for those sales.

L. In all, from October 1987 until October 1992, Dublin repealed this practice thirteen times.

M. Dublin freely sold stock to the public but did not regularly engage in a cash purchase of publicly held stock unless threatened or under duress.

20. The transaction described in paragraph 19 is subject to the Ohio Securities Act, O.R.C. Chapter 1707 and §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. ñ78j(b)) and Rule 10b-5 promulgated thereunder.

21. From January 1, 1987 until March 4, 1992, the Defendant Emens and Thomas while representing

Dublin, the officers and directors of Dublin, and the Issuers prepared all legal documents incident to the sale of securities. From January 1, 1987 through the middle of March, 1992, the Defendants represented Dublin in all matters of compliance as a broker/dealer, with the Ohio Department of Commerce, Division of Securities, (hereinafter referred to as the "Division") in the State of Ohio.

22. The Defendants were engaged by Dublin to provide legal services in all facets of intrastate securities including the day to day operations of Dublin, initial public stock offerings, purchase and sale of stock to the public, arranging and structuring loans, preparing loan documents between Dublin Corporations and employees of Dublin, loans to third parties, loans to Issuers and Insider Investors, and the compilation and review of information and financial statements filed with the Division reflecting the financial condition of Dublin Securities, Inc.

23. Plaintiff states that for each initial public stock offering, the Issuers accepted, as part of the "deal" the Defendants as special counsel. Each Issuer understood that the Defendants were acting on behalf of and representing the interest of Dublin, although the fees for the legal services associated with the sale of their stock was Issuer's responsibility.

24. The Defendants were agents of Dublin's officers and directors while representing the Issuers.

25. During the initial preparation of Form 6(A)(1), the Defendants met with the Issuer to "explain the deal". Except for minor negotiations, the terms were offered to the Issuer on a "take it or leave it basis."

26. Once the deal was accepted, the Defendants would restructure the Issuers' corporation, prepare and clean up all corporate minutes, review the business contracts, business files and financial condition of the Issuer, prepare and submit Form 6(A)(1) and attachments, prepare and arrange for the issuance of stock certificates and warrants certificates.

27. Defendants filed with the Division on behalf of Issuer and Dublin Form 6(A)(1) and attachments which represented that the sale of units would be made sold by the Issuer without the assistance of Dublin employees; that Dublin did not have a definite intention to purchase the warrants or to sell the Issuers' shares to the public; that Dublin may buy the warrants, exercise the warrants and later sell shares to the public; and that the total commission, expense, remuneration, or discount in connection with the sale was limited to 3% of initial offering price.

28. Prior to 1987, Defendant Emens Hurd established a due diligence committee charged with the responsibility for approval and supervision of legal services rendered to clients in connection with the registration and issuance of securities (the "Due Diligence Committee").

29. Members of the Due Diligence Committee consisted of lawyers at Emens Hurd who specialized in securities matters, including Defendants Hurd and Thomas.

30. The Due Diligence Committee designated Defendant Thomas to perform: "due diligence" on almost all Form 6(A)(1) intrastate securities filings with the Division in which Dublin acted as the broker/dealer in the sale of securities.

31. Defendant Thomas received memos and notes from other employees of Emens Hurd including Steve Russi and Paul Hess which discussed the conduct and activities of the officers and directors of Dublin, their involvement in the Issuer's sale of units to Insider Investors, and purchase of shares and warrants from the Insider Investors, and discussed various interpretations of Ohio Securities Laws regarding a public shareholder's receipt of an offering circular.

32. Defendant Hurd knew from the first initial public offering involving Dublin and Issuer (Agents Financial Group, Inc.), that Dublin employees, officers and directors contacted Insider investors. Defendants Thomas and Emens Hurd received information during the performance of due diligence that Dublin, pursuant to the advice of Defendant Hurd, was selling securities to the public in a manner that required disclosure to the Division or modification of the terms or conditions of the initial public offering.

33. The Plaintiff states that the Defendants simultaneous representation of Dublin and the Issuers relating to the filing of Form 6(A)(l), and its attachments was an indispensable element in the sale of Sixty Million ($60,000,000) of securities.

34. Plaintiff states that during the course of representation by the Defendants, Dublin's officers and directors, employees and Clarence J. Eyerman converted for their own use, the net sale proceeds of the corporation through various schemes and loans that the Defendants should have discovered and should have known would make the corporation insolvent.

35. Plaintiff states that during the period between 1987 and April 1992 the Defendant billed Dublin for legal services that exceed One Million, One Hundred Thousand dollars ($1,100,000).

36. As a result, on October 22, 1992 the special prosecutor for Franklin County seized all documents and company records of Dublin, forced Dublin into bankruptcy causing Dublin's indebtedness of approximately Sixty Million dollars ($60,000,000) from the sale of worthless securities to the public.

37. Despite the seizure of all documents and company records, Dublin's officers and directors remained in control of Dublin until Dublin's Chapter 11 proceedings were converted and placed under control of a Chapter 7 trustee. Dublin Securities, Inc. was converted to a Chapter

7 on June 10, 1994 and on January 9, 1995 Dublin Management Inc. and Dublin Stock Transfer, Inc. were converted to proceeding under Chapter 7 of the Bankruptcy Code.

38. The Plaintiff, Trustee in Bankruptcy for Dublin, states that Dublin is indebted and damaged because of the claims brought against the trustee in an amount exceeding Sixty Million Dollars ($60,000,000). As a result of the Defendants' legal advice or the lack of it, the claims against Dublin are predicated on violations on Ohio and Federal Securities Laws, civil fraud, criminal fraud, and Ohio statutory and common law cases causes of action.

FIRST CAUSE OF ACTION - NEGLIGENCE

39. Plaintiff incorporates herein by reference as if fully rewritten, all the allegations contained in paragraphs 1 through 38.

40. The Defendants owed a duty to the Dublin Corporation once it was employed by the Dublin Corporation and they owed their allegiance to the corporate entity and not to the officers, directors and employees of Dublin.

41. Plaintiff states that the Defendants were negligent when they departed from the standard of care of a reasonably prudent attorney in the same or similar circumstances practicing securities law.

42. Plaintiff states that the Defendants owed a duty to Dublin Securities, Inc. a Dublin Corporation operating as a broker/dealer, to exercise reasonable care to protect the Dublin Corporation from liability which might flow from the failure of a securities lawyer to make a reasonable, independent investigation to detect and correct false or misleading materials including but not limited to Form 6(A)(1) and its attachments, written responses to the Division, agreements, commitments, or relationships and/or course of action pursued by officers and directors of Dublin. Defendants had a duty to guide the corporation and its officers and directors regarding its obligations, commitments and relationships with the Division, Issuers and the purchasing public to protect it against liability for security law violations.

43. Plaintiff states that Defendants represented Dublin and the Issuers in identical or nearly identical initial public offerings and during the course of these offerings, the Plaintiff states that the Defendants were negligent which includes but is not limited to their:

A. Failure to detect the existence and terms of the "Gentlemens Agreement." and that the "Gentlemens Agreement" was considered a commission by the Division under §1707.06(A)(1) of the Ohio Revised Code.

B. Failure to advise that full disclosure of the "Gentlemens Agreement" and how the deal

worked from beginning to end exposed Dublin to an unacceptable risk of sanctions by the Division, and civil and criminal liability.

C. Failure to advise Dublin that the officers and directors of Dublin and Clarence J. Eyerman's attempt to conceal that "units will be sold to investors who indicate their willingness to sell to Dublin Securities, Inc. up to 70% of the warrants acquired by the Investors at a price equal to $.05 per warrant after the Division 11 considered such an agreement a commission, was a violation of Ohio Security laws.

D. Failure to advise Dublin and its employees that the Division would consider them underwriters in the sale of securities purchased from the Insider Investors and as underwriters, had no exemption under §1707.03M Ohio Revised Code.

E. Failure to advise Dublin corporate entity that Form 6(A)(1) and its attachments including the offering circular contained misrepresentations and omissions that would mislead the Division.

F. Failure to advise Dublin corporate entity that the sale price of shares to the public would

be considered excessive mark-up and require disclosure under §1701.01 to avoid civil and criminal liability because §1701.01 contains language that prohibits any practice or conduct that is fraudulent in law or equity which operates as a deception upon the purchaser.

G. Failure to advise Dublin corporate entity and failed to disclose in the offering circular for each Issuer certain risk factors;

i. A significant risk that the Issuer may not get his money from sales to Dublin shareholders because of Dublin's past failures to exercise warrants;

ii. Dublin was selling short far beyond any acceptable time period. i.e. Dublin sold to the public but continually failed to exercise warrants to buy stock from the Issuer.

iii. That public shareholders had paid Dublin for stock but failed to receive stock certificates.

44. Plaintiff further states that the Defendants failed to advise that information contained in the offering

circular concerning the financial condition and projection of many of the Issuers was misleading.

45. The Defendants participated in the filing of the annual financial statements of Dublin with the Division of Securities and further, the Plaintiff states that the Defendants were negligent when they failed to detect that Dublin corporate entity was at a high risk for insolvency and/or was essentially insolvent because money from public sales was looted, either stolen out right or disguised as a loan to officers, directors, employees, Clarence J. Eyerman and others.

46. Plaintiff further states that the Defendants were negligent when they failed to advise Dublin corporate entity that before completing the sale of the stock to public shareholders, Dublin should have obtained suitability statements.

47. Plaintiff states that as a result of the Defendant's negligence, Dublin closed down its business operations, was forced into bankruptcy, indicted under criminal charges, and certain officers, directors, and employees are under indictment or entered pleas of guilty and Issuers and public shareholders have filed civil claims against Dublin and the bankruptcy estate for a sum of money in excess of Sixty Million Dollars ($60,000,000).

48. Plaintiff further states that as a result of the Defendant's conduct, Plaintiff's entitled to the return of all legal fees that Dublin paid the Defendants.

SECOND CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY

49. Plaintiff incorporates herein by reference as if fully rewritten, all the allegations contained in paragraphs 1 through 48.

50. At all times herein, Defendants represented Dublin and as its legal counsel, the Defendants owed their allegiance to the corporate entity and not to the stockholders, directors, officers and employees or other representatives of Dublin. The Defendant owed the duty to keep paramount Dublin's interest, and the Defendant's professional judgment should not have been influenced by personal desires of any person, officer, director or employee. Plaintiff further states that the Defendants had a duty to withdraw from providing any service to the officers, directors, employees or other representatives of Dublin once they knew or should have been convinced that the interest of the corporation was not served by the Defendants' representation of the officers, directors, employees and other persons connected with Dublin.

51. Plaintiff states that some, if not all of the directors engaged in illegal or fraudulent conduct. Defendants breached their fiduciary duty when they failed to act in the best interest of the corporation when they failed to rectify illegal or fraudulent conduct after available information clearly established that all or some of the

officers, directors and employees had perpetrated a fraud on the corporation and others.

52. Plaintiff further states that the Defendants breached their fiduciary duty when they failed to inform officers, directors and employees of Dublin that their conduct violated Ohio and Federal securities law and failed to reveal the fraud to the effected persons or in the alternative withdraw from employment of Dublin.

53. Plaintiff states that as a result of the Defendant's breach of fiduciary duty, Dublin closed down its business operations, was forced into bankruptcy, indicted under criminal charges, certain officers, directors, and employees are under indictment or entered pleas of guilty, and Issuers and public shareholders have filed civil claims against Dublin and the bankruptcy estate for a sum of money in excess of Sixty Million Dollars ($60,000,000).

THIRD CAUSE OF ACTION - NEGLIGENT MISREPRESENTATIONS

54. Plaintiff incorporates herein by reference as if fully rewritten the allegations contained in paragraph 1 through 38.

55. Clarence J. Eyerman and David Carmichael have been charged with criminal violations including negligent misrepresentations in violation of O.RC. §1707.44(B)(1).

56. Defendant Hurd has been charged with a criminal violation of the Ohio Securities Law under §1707.44(B)(I), Ohio Revised Code.

57. Negligent misrepresentations charged to Defendant Hurd are based on a common law negligence standard-which holds Hurd responsible for representing facts to be different than he should have known them to be if he had exercised reasonable diligence to ascertain the facts prior to making the representation.

58. Plaintiff states that Defendant Hurd and agents/employees of Emens Hurd made or caused Issuers to make negligent misrepresentations when they represented facts to be different than they should have known them to be if they had exercised reasonable diligence to ascertain the facts.

59. Defendant Hurd in concert with agents and employees of Defendant Emens Hurd caused negligent misrepresentations to be made regarding the following:

A. Question 7 on Form 6(A)(1) represented that the securities would be sold only by the issuing corporation,

B. Question 9 on Form 6(A)(1) represented that the total commission, remuneration, expense or discount in connection with the sale of securities would be limited to 3% of the initial offering price.

C. On Form 6(A)(1) and the attached offering circulars for the Issuers represented that Dublin had no obligation to purchase and Insider Investors had no obligation to sell their warrants to Dublin and that Dublin did not know when, if ever it would seek to acquire such warrants.

D. Subscription agreements for Insider Investors represented that no arrangements had been made with the Insider Investor regarding any subsequent sale or transfer of warrants or common shares acquired pursuant to the offering.

60. Plaintiff states that under Ohio law Defendant Hurd and Defendant Emens Hurd made negligent misrepresentations which resulted in the unregistered sale of over Sixty Million Dollars ($60,000,000) worth of securities.

FOURTH CAUSE OF ACTION - RECKLESS NESS

61. Plaintiff hereby incorporates all the allegations contained in paragraphs 1 through 60 as if fully rewritten.

62. The Defendants conduct described herein was reckless and in conscious disregard to the known rights and interest of the corporate entity and to the fiduciary duty owed to the Dublin corporate entity, under circumstances in

which there existed probability in causing substantial harm to the Dublin Corporation, thus entitling the Plaintiff to compensatory and punitive damages as well as attorney fees.

FIFTH CAUSE OF ACTION - NEGLIGENCE OF EMENS HURD

63. Plaintiff hereby incorporates all the allegations contained in paragraphs 1 through 62 contained in this complaint as if fully rewritten herein.

64. Defendant Hurd was a partner in Emens, Hurd, Kegler & Ritter Co., L.P.A. and at all times acting within the scope of his employment or apparent agency.

65. Defendant Thomas is a partner and agent-employee of Emens, Hurd Kegler & Ritter Co., L P.A. and at all times acting within the scope of his employment or apparent agency.

66. Defendant Hurd and Thomas relied upon a number of other lawyers, associates, and employees of the firm to provide the legal services to Dublin and the Issuers.

67. The Defendant Thomas and Hurd and partners, associates and employees provided legal services to Dublin which benefited the Defendant Emens, Hurd and was calculated to facilitate and promote the business and financial interest of Defendant Emens Hurd. Defendant Emens Hurd by and through its partners, associates, agents and representatives working with Defendant Hurd knew or

should have known that Defendant Hurd's advice, decisions and opinions regarding Dublin's sale of securities pursuant to O.R.C. §1707.06(A)(1) and §1707.03(M) was imprudent and a departure from the standard of care of a reasonably prudent securities lawyer in the same or similar circumstance.

68. Plaintiff states that Defendant Emens Hurd was negligent and breached its fiduciary duty to Dublin when it failed to intervene and properly advise Dublin, its agents, employees, and/or take action to correct Defendant Hurd's and Thomas' departure from the standard of care.

69. Defendant Emens Hurd benefited from the failure of its attorneys, employees, associates, and committees by and through the receipt of fees in the approximate amount of ($1,100,00).

70. At times the Defendant Hurd departure from the standard of care was reckless, and Defendant Emens Hurd by and through its partners, associates, agents and employees were reckless, and acted in conscious disregard of the known rights and interest of Dublin corporate entity under circumstances in which their existed a great probability of causing substantial harm.

71. Defendant Emens Hurd is liable to the Plaintiff for the conduct of its former partner, Defendant Thomas and other attorneys, agents and employees for damages as previously set forth in the separate causes of action in this Complaint. Defendant Emens Hurd is liable

for its negligence, breach of fiduciary duty and reckless conduct separate and apart from respondent superior.

SIXTH CAUSE OF ACTION - COMMON LAW FRAUD

72. Plaintiff hereby incorporates all the allegations contained in paragraphs 1 through 38 contained in this complaint as if fully rewritten herein.

73. Plaintiff states that Defendant Hurd and other attorneys, associates and employees of Emens Hurd knew that the Division had refused to approve the form of transaction that Dublin and Hurd purposed in Agents Financial Group, Inc. The Divisions reasoning for refilsal was that the agreement between Dublin and the Insiders allowed Dublin to immediately purchase 70% of the warrants for $.05 per warrant and then sell them to the public constituted a commission that nullified the exemption from registration under §1707.03(M) of the Ohio Revised Code.

74. The Defendants, Clarence J. Eyerman and officers, directors and employees of Dublin changed the wording describing the deal in Form 6(A)(1) and the attached offering circulars knowing that the essence of the deal and the commitments of Dublin, Issuers and the Insider Investors remained the same.

75. In each successive deal from Agents Financial, Inc. through Telelogic Communications, Inc. the representations in Form 6(A)(1) and all of the necessary

attachments to 6(A)(1) remained the same. Only after the Division stepped up its inquiry into Dublin's activities did the representations caused by the Defendants and the officers and directors of Dublin start to hedge on the existence of a commitment among Dublin, the Issuers and the Insiders.

76. The Defendant's caused representations and certain statements of material fact regarding the proposed structure of Dublin's deals with the Division knowing that the statements contained in Form 6(A)(1) its attachments, offering circulars, additional documents and letters were untrue. The Defendants knew that the forms and documents for each Issuer contained false and misleading statements and material fact including but not limited to:

A. That the Issuers' units would be sold only by the Issuer without the involvement of an underwriter;

B. That the remuneration to be paid in connection with the sale of the Issuers' units would be limited to 3% of the initial offering price;

C. That Dublin had no obligation to purchase and the Insiders had no obligation to sell their warrants to Dublin and that Dublin did not know, when, if ever, it would seek to acquire such warrants.

77. The Defendants knew and failed to disclose to Dublin corporation, Issuers and the Division that:

A. That Dublin and the Insiders had agreed Dublin would immediately pay of the warrants for $.05 per warrant and the remainder of the warrant at Dublin's option, at pre-determined prices agreed by the Insiders and Dublin.

B. In almost all cases the Issuers were extremely marginal company(s) or individuals whose sole valuable asset was an idea and that the Insider Investor invest in such marginal, under capitalized or insolvent start up business unless the Insider Investors were guaranteed that they would get their money back.

C. The Defendants may not have known that the Insider Investors and the sales force of Dublin would mislead the public as to the value of the stock, but the Defendants did know that the true financial condition of each of the Issuers would not be made known by Dublin prior to the sale of securities to the public.

D. The Division would be misled by the documents filed on behalf of the Dublin and the Issuers.

E. The subscription agreements containing the statements made by each insider were designed to disguise the agreement between Dublin and the Insider Investors.

F. Neither the Insider Investors nor the Issuers would participate in the initial public stock offering unless they agreed to the terms set by Clarence J. Eyerman and the officers and Directors of Dublin.

G. The loans to Clarence J. Eyerman and others from Dublin Management, Inc. were unusual and not reasonable and customary business practice and that Clarence J. Eyerman had no intent to repay his loans.

H. The Defendants participated in structuring financial data for the audited financial statements of Dublin and the loan arrangements between Dublin Corporations knowing that the financial statements and the accounting procedures used for each corporation would hide Dublin's insolvency from the Division.

78. The Plaintiff trustee states that without the Defendants active participation and representations filed with the Division and their manipulation of loans, corporate records and financial statements, the sale of Sixty Million dollars ($60,000,000) of securities leading to claims against

Dublin in the amount of sixty million dollars ($60,000,000) would not have occurred.

SEVENTH CAUSE OF ACTION - RIGHT OF CONTRIBUTION

79. Plaintiff incorporates herein by reference as if fully rewritten all the allegations contained in paragraphs 1 through 76.

80. Plaintiff states that the former officers and directors of the corporation are under indictment or have entered a plea of guilty to criminal charges.

81. Plaintiff states that the Defendants failure to protect Dublin from civil liability which was a direct result of the Defendants negligence, breach of fiduciary duties, negligent misrepresentations, reckless conduct and fraud all causing violations of Ohio and Federal Securities laws resulted in approximately Sixty Million Dollars ($60,000,000) of civil liability claims and were performed in concert with the officers, directors and employees of Dublin and further that these actions taken in concert with the officers, employees and directors of Dublin were indispensable in the sale -of securities to the public.

82. Defendants are joint and concurrent tortfeasors and the Plaintiff has a statutory right of contribution for damages.

PRAYER

Wherefore, Plaintiff respectfully demands judgment in favor of the Plaintiff and against the Defendants in the amount in excess of Sixty Million Dollars ($60,000,000) and for compensatory and punitive damage and the right of contribution, One Million One Thousand Dollars ($1,100,000) in legal fees, costs, attorney fees, prejudgment interest and such further relief as the Court deems just and equitable.

/s/Gerald J. Todaro

Gerald J. Todaro
Ohio Sup. Ct. Reg. #0000946
GERALD J. TODARO CO., L.P.A.
175 South Third St., Suite 350
Columbus, Ohio 43215
Telephone: (614) 2214013
Attorney for Plaintiff

JURY DEMAND

The Plaintiff demands a jury of eight (8) on all claims herein.

/s/ Gerald J. Todaro

Gerald J. Todaro
Ohio Sup. Ct. Reg. #0000946
Attorney for Plaintiff